MOHAMED MAT AMIN & ORS

v.

MOHD RABU IHSAN

HIGH COURT MALAYA, KOTA BHARU
ARIFIN ZAKARIA J
[CIVIL APPEAL NO: 12-49-94]
18 JULY 2001

CIVIL PROCEDURE: *Appeal - Apportionment of liability - Whether defendant to be wholly blamed for accident*

EVIDENCE: *Burden of proof - Prima facie case - Whether on balance of probabilities a prima facie case had been established against defendant*

EVIDENCE: *Burden of proof - Shifting of, to defendant - Whether defendant having failed to discharge burden, judgment ought to be entered in favour of plaintiffs*

CIVIL PROCEDURE: *Damages - Assessment of damages - Loss of dependancy arising from accidental deaths of victims - No assessment of multiplicand figure by senior assistant registrar - Whether correct*

The plaintiffs appealed against the decision of the learned senior assistant registrar ('SAR') who dismissed their claim for loss of dependancy and special damage as a result of a fatal road accident involving the 1st and 2nd deceased persons. The plaintiffs contested on the issue of liability and claimed that the defendant was wholly to be blamed for the accident.

Held:

[1] The defendant had admitted that the car driven by him was involved in the collision with the motorcycles ridden by the 1st and 2nd deceaseds, except that the defendant alleged that he was not to be blamed for the accident. However it did fall squarely upon the defendant to explain how his car came to rest on the other side of the road, *ie* at one point of time or another, it cut across the deceaseds' right of way. (p 53 d-e)

[1b] On the balance of probabilities, a *prima facie* case had been made out against the defendant. It was therefore for the defendant to rebut the same. The defendant however chose not to give any evidence. In the circumstances, the defendant was wholly to be blamed for the accident. (p 53 f)

[2] In the claim for loss of dependancy relating to the 1st deceased, the learned SAR had earlier rejected the plaintiffs' claim on the premise that the plaintiffs' testimony was not convincing. Consequently, he did not compute the multiplicand figure. In the circumstances he was still obliged to make a finding of what he thought should have been the appropriate figure of the multiplicand. (p 54 b & g)

[Appeal by 1st, 2nd, 3rd and 4th plaintiffs allowed with costs here and in the court below.]

Case(s) referred to:
Jaafar Shaari & Anor v. Tan Lip Eng & Anor [1992] 3 CLJ 1600; [1992] 2 CLJ (Rep) 597 ***(ovrd)***
Jaafar Shaari & Anor v. Tan Lip Eng & Anor [1997] 4 CLJ 509 ***(ovrd)***
Lim Kiat Boon & Ors v. Lim Seu Kong & Anor [1980] 2 MLJ 39 ***(foll)***
VVV Menon v. Henri Pigeonneau [1957] 23 MLJ 85 ***(refd)***
Yew You & Anor v. Mah Poay Koh & Anor [1970] 1 MLJ 57 ***(foll)***

Legislation referred to:
Civil Law Act 1956, ss. 7(3)(iv)(d), 8

Other source(s) referred to:
Mayne & Macgregor, *Damages*

For the plaintiff - Brijnandan Singh Bhar; M/s Brijnandan Singh Bhar & Co
For the defendant - Suresh G Sreedharan; M/s Kanaga, Suresh & Co

Reported by Raja Vishnu Sivarajah

JUDGMENT

Arifin Zakaria J:
This is an appeal by the plaintiffs against the decision of the learned sessions court judge in dismissing their claim for loss of dependency and special damage arising out of a road accident on 18 December 1992. It is alleged by the plaintiffs that on the fateful day at about 9.30pm while Mohd. Nor bin Mohamed ("1st deceased") was riding motorcycle No. BCR 2084 and Noor Hasisan bin Mohd. Nor ("2nd deceased") was riding motorcycle No. DP 211 an accident occurred in which both of them died. It is averred that at the material time the deceaseds were travelling along Palekbang/Tumpat road in the direction of Kampong Besut, Tumpat, while the defendant was driving his motorcar No. JT 1301 along the same road in the direction of Pasir Pekan Hilir, which is the opposite direction to that of the deceaseds. The plaintiffs claim that the defendant was wholly to be blamed for the accident. The particulars of negligence were rendered in 23 paragraphs in the statement of claim. The defendant in his defence denied the plaintiffs' allegation and

contended that at the material time there was a collision involving the two motorcycles ridden by the deceaseds with a motor van No. CAD 460 and as a result of the said collision the two motorcycles were thrown in the direction of the defendant. The plaintiffs called six witnesses.

The defendant was not called to give evidence. No explanation was given as to why he was not called. Based on the evidence before him the learned sessions court judge in his ground stated thus:

> Dalam perbicaraan, pihak Plaintif telah memanggil seramai 6 orang saksi, manakala pihak Defendan tidak memanggil saksi bagi memberi keterangan. Walau bagaimanapun berdasarkan keterangan pihak Plaintif yang ada di hadapan Mahkamah sehingga penutupan kesnya, Mahkamah menolak juga tuntutan Plaintif dengan kos kerana atas imbangan keberangkalian didapati pihaknya gagal membuktikan kecuaian Defendan dalam menyebabkan perlanggaran yang membawa kepada kematian kedua-dua simati.

Thereafter the learned sessions court judge ventured to give his reasons for arriving at his decision. In brief he stated that the positions of the vehicles found at the accident and the absence of any eye witness called by the plaintiffs had driven him to conclude that the plaintiffs failed to prove their case. He found support for his decision in the case of *Jaafar bin Shaari & Anor v. Tan Lip Eng & Anor* [1992] 3 CLJ 1600; [1992] 2 CLJ (Rep) 597 which is the decision of the High Court, where the learned judge said:

> No eye witness testified on behalf of the Plaintiff as to the manner in which the accident took place. A certified true copy of a sketch plan which Acting Sergeant Baharom (PW4) testified he drew as Investigating Officer of the case merely showed a motorcycle lying beside the double white line in the centre of the road but it offered no help as to the manner in which the accident took place.

The learned counsel for the plaintiffs pointed out that the High Court decision in *Jaafar bin Shaari (supra)* had been overturned by the Supreme Court (see *Jaafar bin Shaari & Anor v. Tan Lip Eng & Anor* [1997] 3 MLJ 639). The facts in that case as found in the head note of the report are briefly as follows. The appellants, personal representative of Sofiah bte Ahmad ("the deceased") brought an action in negligence against the respondents and claimed for damages under ss. 7 and 8 of the Civil Law Act 1956. The deceased, a pedestrian was killed in a collision involving a motorcycle ridden by the first respondent and owned by the second respondent. The appellants' case was that the first respondent knocked into the deceased while she was standing in the centre of the road. However, the respondents alleged that the deceased was crossing the road when it was unsafe for her to do so. Apart from the first respondent, there was no other eyewitness to the accident. The only other

available evidence of the manner of the accident was a police report (Report No. 424/84) which was lodged by the first respondent after the collision and was included in Part II of the agreed bundle of documents. The respondent had also categorically denied the allegations of negligence by the appellants in their statement of defence. At the trial, the only witness called by the appellants upon the question of fault was the investigating officer who had prepared the sketch plan of the scene of the accident. The trial judge held that Report No. 424/84 was inadmissible. He then dismissed the claim on the ground that there was no evidence to support the allegation of negligence by the appellants as the sketch plan was inconclusive on the issue. The decision was upheld by the High Court. The appellants appealed contending, *inter alia*, that the High Court judge had erred in law when he rejected and failed to consider the contents of the police report and when he decided that the doctrine of *res ipsa loquitur* did not apply. In allowing the appeal the Supreme Court went to great length to explain the doctrine of *res ipsa loquitur* and the burden of proof on the plaintiff.

Peh Swee Chin FCJ at p. 707 observed as follows:

> The doctrine of *res ipsa loquitur* is, in truth, a mere rule of evidence, per Whyatt CJ in *Menon v. Pigeonneau* [1957] MLJ 85, and it means that an event which, in the ordinary course of things, is more likely than not to have been caused by negligence is, by itself evidence of negligence. Thus, in *Menon*, the event that invoked the doctrine was stated by the Court of Appeal to be the defendant's car turning across the road to its wrong side, and this was said to lead to a *prima facie* case of negligence which had to be rebutted. The doctrine is of course not applicable in criminal cases, but only in civil cases.
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> It is in this connection, to be borne in mind, that the mere happening of an accident is not *res ipsa loquitur*, but if such an accident involves at least a demonstrable degree of negligence, be it a minor one, then the doctrine, which is a rule of evidence, applies.
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> It was proved through the relevant sketch plan that the fatal accident in the instant appeal took place very close to the centre of road, even though not directly on the central dividing double lines. After falling on its left side body, on its left half of the road but beside the centre of dividing lines, the motor cycle's right front wheel was 2ft 6 ins and left wheel 2ft 7ins respectively from the said double lines. The width of the motor cycle's left half of the road was 30ft. In these circumstances, it would not be wrong for a court in these circumstances to say that the accident took place practically at or near the centre of the road. If the motor cycle's left half of the road was 30ft wide, how and why on earth should a motor cycle go to the centre of the road there to have a collision with a pedestrian who died of the injuries caused thereby? In the absence of any indications to the contrary on the sketch plan, the motorcyclist would appear to be *prima facie* negligent for failing to keep more

to its left side of the road, for failing to avoid an accident; or for failing to keep a proper lookout. For illustration, examples of the said indications to the contrary could be the presence of the deceased's body on her wrong side of the road or evidence of some blood stains on the deceased's wrong side which did not come from the motorcyclist. Such indications could have negatived a *prima facie* presumption of negligence or *res ipsa loquitur*, whereupon it would behove the plaintiffs to prove negligence affirmatively against the motorcyclist. The similar sort of *prima facie* negligence presumed against the motorcyclist above could of course be similarly presumed against the opposition party involved in the same accident, *viz* the deceased, but this will depend on whether certain adverse inference could be drawn. I will depend on this aspect at a later stage. The court has been deprived of the chance to look at the excluded Report No. 424/84, and of the chance to hear an explanation from the first defendant as to how it happened. Yet the first defendant could not be more than a few hours away by air from Australia and who, it must have been decided by the defence, need not attend court. The cost of an airline return ticket would have been by no means an insurmountable difficulty to the first defendant.

The nett result is that the plaintiffs had established a *prima facie* case of negligence as described above or *res ipsa loquitur* which had not been rebutted by the first defendant by means of any explanation consistent with absence of negligence or to show who was actually negligent.

I am fortified in view of such *prima facie* case of negligence by a reconsideration of those two well-known cases of *Baker v. Market Harborough* [1953] 1 WLR 1472 (CA) and *France v. Parkinson* [1954] 1 All ER 739 (CA).

Gopal Sri Ram JCA in the same case at p. 712 stated that:

For, once a defendant in civil proceedings elects not to call evidence, then all the evidence led by the plaintiff must be assumed to be true.

I would also like to refer to the case of *V.V.V. Menon v. Henri Pigeonneau* [1957] 23 MLJ 85 where I find the explanation given by Whyatt CJ on the doctrine of *res ipsa loquitur* highly illuminating. At p. 85 he explained thus:

This doctrine is sometimes referred to as a principle of law but it is, in fact, no more than a rule of evidence of which the essence is, as Lord Radcliffe pointed out in *Barkway v. South Wales Transport* that an event which in the ordinary course of things is more likely than not to have caused by negligence is by itself evidence of negligence. The event which the plaintiff relies upon in this case as evidence of negligence is that the defendant's car suddenly turned across Mountbatten Road on to its wrong side and there collided with the plaintiff's car which was being driven in a normal manner on its correct side in the opposite direction. In the ordinary course of things, such an event does not happen if the driver of the car is using proper care and the fact that it did happen in this case establishes a *prima facie* case of negligence against

the defendant. The plaintiff therefore, succeeds unless the defendant rebuts this *prima facie* case which he may do in one of two ways, either he may prove that the event, that is to say, the sudden turn of the car across the road on to its wrong side was due to a specific cause and such cause was not attributable to lack of care on his part, or, that the event is due to some cause unknown but that he himself throughout exercised reasonable care. I now turn to consider the application of these principles to the facts of this case.

In the light of the above authorities I shall now examine the available evidence before the court. According to PW6 the investigating officer at p. 50 of ROA he said – "Hasil siasatan saya juga arah motosikal dari Palekbang ke Tumpat dan kereta dari Tumpat ke Palekbang." Next we need to see the positions of the vehicles after the accident as indicated in the sketch plan (P8) drawn up by PW6. In the sketch plan the defendant's car marked 'F' was found lying on the wrong side of the road if one were travelling from Tumpat to Palekbang. The inference that may be drawn is that the defendant must have cut across the path of oncoming traffic before coming to rest in the padi field. The motorcycle of the 1st deceased person BCR 2084 marked "G4" was found by the left side of the road in the direction from Palekbang to Tumpat. This is the proper side of the road if one were travelling from Palekbang to Tumpat. The motorcycle DP 211 ("G2") ridden by the 2nd deceased was found close to centre white line of the road on the defendant's right of way. The glass splinters "J" was found on the centre of the road where the motorcycle DP 211 was found. As for the damage to the motorcar JT 1301, PW5, at p. 51 ROA said, "Selain dari tayar pecah kereta itu mengalami kerosakan teruk di bahagian hadapan dan di sisi sebelah kiri. Maksud sisi pintu sebelah kiri."

The learned counsel for the plaintiffs submitted that the reasonable inference that may be drawn from these facts and circumstances is that a *prima facie* case has been made out against the defendant. He contended that the burden of proof then shifted to the defendant to rebut the plaintiff's case, and the defendant having failed to discharge that burden judgment ought to be entered in favour of the plaintiffs. The defendant's counsel in reply argued that since no eye-witness has been called by the plaintiffs to show how the collision had occurred the blame should not be put on the defendant. In my view, the absence of eye-witness to the accident should not shut the plaintiffs out in proving their case.

As stated by Ong Hock Thye CJ in *Yew You & Anor v. Mah Poay Koh & Anor* [1970] 1 MLJ 57, 59:

> It is elementary law that the onus on the plaintiff is satisfactorily discharged once it appears to the court on balance of probabilities that the circumstances are more consistent than not with the defendants' negligence. Evidence in support of the plaintiffs' case is not necessarily confined to what is adduced on their behalf, but the whole of the evidence, from whatever source, must also be taken into consideration. In my view, accordingly, the mere fact that the evidence of the alleged eye-witness proved worthless is far from conclusive against the plaintiff. In the nature of things the plaintiffs were compelled to rely mainly on the mute testimony of the sketch plan and photographs, together with the observations of the investigating officer as the foundation of their case. They could also avail themselves of admissions by the defence.

In para. 3 of his defence the defendant admitted that the motor car No. JT 1301 driven by him was involved in the collision with motorcycle BCR 2054 and DP 211 except that the defendant alleged he is not to be blamed for the said collision. This is not a case where the defendant has completely denied that he was at all involved in the accident. In that situation I am of the view that the observation made by Ong Hock Thye CJ above aptly applies to this case. Therefore, in the circumstances of this case I agree with learned counsel for the plaintiffs that it falls squarely upon the defendant to explain how his car came to rest on the other side of the road. It can't be denied that to end up where it was, in the "bendang" on the other side of the road, the defendant's car must have, at one point of time or other, cut across the deceaseds' right of way.

On the balance of probabilities, I think, a *prima facie* case has been made out against the defendant. It is therefore for the defendant to rebut the same. The defendant chose not to give any evidence. In the circumstances I find the defendant wholly to be blamed for the accident.

Quantum

In respect of the 1st deceased person

Special damage

Parties agreed to the sum of RM2,000 for funeral expenses and the sum of RM450 for the cost of repair to the motorcycle.

Loss of Dependency

The 1st, 2nd and 3rd plaintiffs are the father, mother and son of the 1st deceased person. The claim for loss dependency is made under the Civil Law Act 1956 ("the Act").

The Multiplier

The 1st deceased was 35 years old at the time of his death. Based on s. 7(3)(iv)(d) of the Act the multiplier works out as follows:

55 – 35 = 20/2 = 10 x 12 months = 120 months

The learned sessions judge rejected the plaintiff's claim for loss of dependency on the premise that the evidence of PW1 and PW2 is not convincing. He stated his reasons in the following words:

> Keterangan Plaintif Pertama dan Kedua (SP1 dan SP2) tidak meyakinkan Mahkamah. Mahkamah meragui kebenaran kenyataan mereka tentang perbelanjaan mereka untuk makan harian, simpanan dan pembayaran sewa tanah. Mahkamah tidak mempercayai keterangan mereka bukan sahaja atas ketidakmunasabahan kenyataan mereka malah demeanor mereka semasa memberikan keterangan dan ketiadaan saksi mengenai pembayaran harga tanah. Keterangan SP5 (Penyelia Pembangunan Mukim) mengenai pendapatan simati Mohd. Nor Mohamad juga Mahkamah tidak dapat mempercayainya kerana dibuat berdasarkan agakan sahaja. Mahkamah tidak dapat menerima sebagai kesimpulan bahawa simati tersebut berpendapat RM1,500/- hasil upah menaik kelapa dan menjual kelapa muda.
>
> Oleh itu Mahkamah mendapati Plaintif Pertama, Kedua dan Ketiga gagal membuktikan kehilangan tanggungan mereka dengan kematian simati Mohd. Nor bin Mohamad.

The learned sessions judge rejected the evidence of witnesses for the plaintiffs on the ground that the claim is unreasonable and on the observation of their demeanour in court. Unfortunately he did not give reasons why he found their evidence to be unreasonable and he did not elaborate what was the nature of their demeanour in court that led him to conclude that they are not reliable witnesses. The sessions judge merely noted that:

> Dari demeanor saksi semasa menjawab soalan, mahkamah meragui kebenaran keterangannya.

I agree with the submission of learned counsel for the plaintiffs that even though the sessions judge disbelieved the witnesses for the plaintiffs, as he found here, still he is obliged to make a finding of what he thought should be the appropriate figure of the multiplicand. It should be noted that even the learned counsel for the defendant in his submission at p. 152 of ROA had suggested a figure of RM350 per month. It was never challenged that the 1st deceased prior to his death was of good health and was engaged in the business of buying and selling coconuts. The only dispute is as to the amount of his income per month and consequently the amount he gave to the plaintiffs for their support. PW1 and PW2 in their evidence stated that the 1st deceased

gave the family RM1,400 per month. Out of this sum PW1 said they spent RM300 for food and RM300-400 for motorcycle instalment. There is a balance of RM500-600 every month saved by the PW1. The evidence of PW1 is supported by PW2, she went further to say that RM5 per day is expended for taxi fare and pocket money for the third plaintiff for his schooling. PW5, Penyelia Pembangunan Mukim, in his evidence said that he knew the deceased for about eight years when the 1st deceased was staying in Kg. Besut. He testified that the 1st deceased was working as a coconut picker and selling of coconuts. He estimated that the monthly income of coconut pickers as being around RM50 per day. Before me, Encik Suresh for the defendant submitted that the multiplicand should be around RM400. Therefore, judging from the evidence before the court it is wholly against the weight of the evidence to say that the 1st deceased had not contributed anything at all towards the upkeep of his family. It is also relevant for this purpose to consider the ages of the 1st, 2nd and 3rd plaintiffs herein. The 1st plaintiff (PW1) in his evidence stated that he is 64 years old and the 2nd plaintiff (PW2) stated that she is 66 years old. While the 3rd plaintiff was in standard five at the time of the trial. In view of the respective ages of the plaintiffs I think it is not unreasonable to infer that the 1st deceased was the main if not the sole breadwinner of the family. In the light of that it is open to the court to make an estimate of the amount of contribution by the 1st deceased person for the upkeep of his family. It is wrong in principle to say that since the plaintiffs failed to prove positively the exact amount of contribution, therefore, no award should be made by the court. In all the circumstances of the case, taking into account the number of family members relying on the 1st deceased person and the general standard of living, I think, the sum of RM600 per month is a fair and appropriate figure.

On the above ground the total award for loss of dependency in respect of the 1st, 2nd and 3rd plaintiffs will be as follows – 120 x RM600 = RM72,000.

In Respect Of The 2nd Deceased Person

Special Damage

Parties agreed to the sum of RM2,000 for funeral expenses and the sum of RM450 for cost of repair of motorcycle. However the learned sessions court judge, on the objection of counsel for the defendant, rejected the sum of RM450 on the premise that the motorcycle in question did not belong to the 2nd deceased. The learned counsel for the plaintiff contended that this is wrong in principle on the ground that the motorcycle be it the property of another still need to be repaired. He said it should be left to the conscience of the plaintiffs whether to reimburse the owner of the motorcycle for the cost of the repair. The defendant should not be allowed to contend that he need not

pay the cost of the repair to the motorcycle because the motorcycle belongs to a third party. He cited the case of *Lim Kiat Boon & Ors. v. Lim Seu Kong & Anor* [1980] 2 MLJ 39 where it was held that:

> ... there should be no reduction where the money is given gratuitously or advanced by a sympathetic employer is based on the principle that the generosity of others is *res inter alios acta* and not something from which the wrongdoer should reap the benefit.

Article 773 of Mayne & Macgregor on *Damages* states, *inter alia*, that:

> The general rule appears to be that no deduction is to be made from the damages, although where it is clear that there was an understanding to repay, the court has awarded the full damages, on terms that the plaintiff pays over the appropriate amount to his benefactor ... Yet if there had been no expectation of repayment on the part of the benefactor so as not to allow such a court direction, it would seem that principle demands that there should still be no reduction in the damages: recompense to employers should depend on the conscience of the Plaintiff.

I agree with the submission of learned counsel for the plaintiffs that on principle the defendant should not benefit from the generosity of others towards the plaintiffs. The defendant should rightly have been ordered to pay the sum of RM450 for the cost of repair to motorcycle to the plaintiffs and it should be left entirely to the conscience of the plaintiffs whether to pay the said sum over to the owner of the motorcycle. I accordingly hold that the defendant is liable to the plaintiffs for the sum of RM450 being the cost of repair of the motorcycle.

(ii) Loss Of Dependency

At the outset of the appeal learned counsel for the 4th, 5th, 7th and 8th plaintiffs conceded that only the 4th plaintiff, the mother of the 2nd deceased, is entitled to claim for loss of dependency.

The learned sessions judge dismissed the claim for loss of dependency by the 4th plaintiff on the ground that he disbelieved the evidence of PW4, the alleged employer of the 2nd deceased. His reason for disbelieving PW4 was because of his demeanor in court. He did not elaborate what specifically was his demeanor in court that had led him to reject totally the evidence of PW4. In the note of proceedings he merely stated – "Melihat kepada demeanor saksi ini Mahkamah meragui keterangannya".

It is not in dispute that at the time of his death the 2nd deceased was 18 years old. According to PW3, the 2nd deceased was at the material time working as batik cloth painter and was earning around RM600 per month. She also claimed that the 2nd deceased gave her RM500 per month. Out of the

said sum she said she used around RM300-400 per month for buying food for herself and the deceased and the balance she kept for herself and the deceased. Her evidence is supported by PW4, Zahari bin Daud who claimed to be the employer of the 2nd deceased. He said he paid the 2nd deceased RM20 per day for each day of work. No payment is made during public holiday. On the average he said the 2nd deceased was earning around RM520 per month. Both the evidence of PW3 and PW4 was not seriously challenged by counsel for the defendant. As a matter of fact at p. 159 of ROA the learned counsel for the defence submitted that the loss of dependency for the 4th plaintiff should be on the multiplier of 7 x 12 and the multiplicand of RM200 which gives a total of RM16,800. I agree with the submission of the learned counsel to the defendant and accordingly adopt the same as my award for loss of dependency in respect of 2nd deceased person.

Conclusion

For the above reasons I allowed the appeal by 1st, 2nd, 3rd and 4th plaintiffs herein with costs both before me and in the court below.